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NOTES

APPLICATION OF THE RULE IN RYLANDS V. FLETCHER TO THE STORAGE OF GASOLINE IN AN AUTOMOBILE IN A PRIVATE GARAGE.—The Rule in Rylands v. Fletcher[1] has recently been applied to the keeping of an automobile in a private garage.[2] This extension or rather modern application of the rule seems to be in accordance with the English interpretation of it which holds that any use not consecrated a natural use by immemorial custom raises an absolute liability for any damage arising from such use.[3] The question has never been directly raised in the United States. There have been, however, several groups of decisions that tend to sustain

[1] L. R., 3 H. of L. 330 (1868).
[2] Musgrove v. Pandelis, 2 K. B. 43 (1919).
[3] 59 U. of P. Law Rev. 320.

a prophecy that the American courts will probably reach the same decision, if the case arises in the same manner as did the recent English case, namely where a mere pleasure car was the subject of the discussion.

The American jurisdictions that have adopted the Rule in Rylands v. Fletcher, in whole or in part, have generally tended to soften its application in cases of commercially productive uses because the economic necessities of this country have in the past demanded that activity be encouraged to the fullest possible extent by refusing to harness these productive uses, with absolute liabilities not based on fault.[4] Furthermore, the country, being comparatively young in its civilization, had no such ancient uses as had England. Whether our courts therefore will deem the automobile as an instrumentality to be classified with the productive uses and as such to be excepted from the application of the Rule or as rather an instrumentality of such inherent danger in comparison with its utility as to be within the Rule may well depend upon whether the question is first presented in the case of a commercial car or a pleasure car.

The recent English case was decided upon the authority of two English cases, Vaughan v. Menlove[5] and Filliter v. Phippard.[6] The former case held that a hay-rick of green damp hay was such an inherently dangerous object that it constituted negligence to pile the hay improperly. The latter case held that a fire intentionally started upon one's land that later accidentally spread to another's land was a case for the application of an absolute liability. In the United States, however, due probably to a misunderstanding of some passages in Blackstone, absolute liabilities in such cases have almost uniformly been refused. Though possibly originally decided erroneously this line of cases has become so numerous and well accepted that there is no longer room for doubt that they clearly express our law on the subject.[7] It seems unlikely therefore that the decision in the recent English decision will have much weight with our courts, it being based on a line of cases in conflict with our own.

As yet, there have been no direct decisions in the United States which fix the status of the automobile within the purview of the Rylands v. Fletcher Rule. However, there are certain decisions which are illuminating as indicating the trend of the judicial mind. While these decisions are not actual authority, since the facts are somewhat remote from the automobile case itself, yet their principle will perhaps be applied to the automobile case and will be regarded as binding in the jurisdictions in which

[4] 59 U. of P. Law Rev. 373, 423.
[5] 3 Bing. N. C. 468 (1837).
[6] 11 Q. B. 347 (1847).
[7] Clark v. Foot, 8 Johns. 421 (N. Y. 1811); Tourtellot v. Rosebrook, 52 Mass. 460 (1846); Fahn v. Reichart, 8 Wis. 255 (1859); Johnson v. Veneman, 75 Kan. 278, 89 Pac. 677 (1907).

they have been decided. The storage of petroleum in tanks has been held to be a use within the principle of Rylands v. Fletcher in Minnesota and in the District of Columbia,[8] the damage occurring merely by reason of its fluid viscous qualities, and in Ohio as an inherently dangerous inflammable substance.[9] The decisions as to whether the storage of inflammable liquids, such as petroleum or gasoline, constitutes a nuisance or a reasonable use seem to be in confusion. While in the earlier cases there was a tendency to deem such uses a nusiance rather readily, now it seems that the commercial utility of such fuels is beginning to affect the courts and to cause them to declare the use a reasonable one[11] unless the circumstances of lack of safety appliances[12] or unsuitability of location[13] are rather extreme.

In principle it would seem that the modern automobile has been developed and perfected to such an extent and its use become so general that the law in regard to it should follow in the footsteps of the law developed in regard to other objects of great utility, but at the same time to a limited extent inherently dangerous, such for example as the steam engine and boiler. The language of Robertson, C. J., in Lexington Co. v. Applegate[14] presents a well considered and clearly expressed concept of what the tendency of the law in such cases should be: "The onward spirit of the age must, to a reasonable extent, have its way. The law is made for the times and will be made or modified by them. The expanded and still expanding genius of the *common law* should adapt it here, as elsewhere to the improved and improving condition of our country and our countrymen. And therefore, railroads and locomotive steam cars—the offsprings as they will also be the parents, of progressive improvement—should not, in themselves, be considered as nuisances, although, in ages that are gone, they might have been so held, because they would have been comparatively useless, and therefore, more mischievous." More recent cases have followed this concept[15] and in Ohio which recognises the Rule in Rylands v. Fletcher it has been held that a steam boiler does not come within the rule, the court saying: "As an agent in the varied departments of industry, the steam boiler has become a necessity in modern life."[16] Can it be said that the modern automobile is a less necessary object of utility than was the steam boiler forty years ago? Certainly the commercial truck appears to posses all the characteristics necessary to be fully covered by the analogy. *G. B.*

[8] Berger v. Gaslight Co., 60 Minn. 296, 62 N. W. 336 (1895); Construction Co. v. Cumberland, 29 App. D. C. 554 (1907).
[9] Laugabough v. Anderson, 22 Ohio C. C. 178 (1901).
[10] Regina v. Lister, 7 Cox C. C. 342 (1857).
[11] Harper v. Standard Oil Co., 78 Mo. App. 338 (1899).
[12] O'Hara v. Nelson, 71 N. J. Eq. 161, 63 Atl. 836 (1906).
[13] Whittemore v. Laundry Co., 181 Mich. 564, 148 N. W. 437 (1914).
[14] 8 Dana 289 (Ky. 1839).
[15] Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239 (1878).
[16] Huff v. Austin, 46 Ohio 386, 21 N. E. 864 (1889).

THE TREATY POWER AND THE TENTH AMENDMENT.—In 1913, Congress passed an Appropriation Act for the Department of Agriculture,[1] one of the provisions of which protected migratory birds by fixing a penalty on anyone who destroyed or captured them. A citizen of Arkansas was indicted in the U. S. District Court for violation of the act[2]. Judge Trieber sustained a demurrer to the indictment and declared the law unconstitutional, since migratory birds are owned by the state in which they are found, and regulations controlling their destruction and capture are a matter exclusively within the state's power, and are not within the province of Congressional action.

In 1916, a treaty was concluded between the United States and Great Britain for the protection of certain migratory birds.[3] To enforce this treaty, Congress passed an act to protect specified birds by fixing a penalty on anyone who destroyed or captured them.[4] Again, it was a citizen of Arkansas who offended and violated this statute; and again, Judge Trieber presided at the criminal prosecution. This time, however, the judge overruled the demurrer to the information, and thereby sustained the act of Congress.[5]

Comparing these two decisions, it is at once apparent that, in the court's opinion, a treaty is valid, and may be made effective by appropriate legislation, although, if it were a statute, it would be unconstitutional, as affecting rights exclusively under control of the states. Or, in other words, the treaty power under the Constitution can abrogate rights reserved to the states, whereas the power of Congress to enact statutes cannot.

Before discussing the relative limits of the treaty making power and the power of Congress to enact statutes, it is necessary to determine whether the subject in question, namely, the control of migratory birds, is one which is exclusively within the power of the states. If birds are the property of the nation, the states would have no power to regulate or prohibit the hunting or killing of them. But in every case in which the question has arisen, the courts have recognized the rule that "animals, denominated as game, are owned by the states, not as proprietors, but in their sovereign capacity, as the representatives and for the benefit of all their people in commom."[6] This has had the approval of the United States Supreme Court in every case which has come before it.[7] The power to control the killing of game is nowhere in the

[1] 37 Stat. 828, 847, c. 145.
[2] U. S. v. Shauver, 214 Fed. 154 (1914).
[3] 39 Stat. 1702.
[4] 40 Stat. 755, c. 28. U. S. Comp. Stat. 1918, p. 1795.
[5] U. S. v. Thompson, 258 Fed. 257 (1919).
[6] U. S. v. Shauver, *supra.*
[7] Martin v. Waddell, 41 U. S. 367 (1842); McCready v. Virginia, 94 U. S. 391 (1876); Smith v. Maryland, 59 U. S. 71, 74 (1855); Manchester v. Massachusetts, 139 U. S. 240 (1890); Lawton v. Steele, 152 U. S. 133 (1893); Geer v. Connecticut, 161 U. S. 519 (1895); The Abby Dodge, 223 U. S. 166 (1911).

Constitution delegated to the federal government. It was urged in certain cases,[8] however, that under the so-called "general welfare" clause,[9] the national government had this dormant right, particularly since the national government could protect migratory wild game with a greater degree of success than could a state government. This contention is best answered by the court's opinion in a case[10] wherein a similar argument was presented: "But the proposition that there are legislative powers affecting the nation as a whole, which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government, clearly appears from the Constitution, independently of the amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the wide spread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the original act, and that, if in the future further powers seemed necessary, they should be granted by the people in the manner they had provided for amending the act." The reservation to the states of the power to control the hunting and killing of migratory birds, is therefore, "made certain" by the Tenth Amendment. An act of Congress cannot usurp or abrogate that power. Can a treaty? The recently decided case of U. S. v Thompson,[11] referred to above, holds that it can.

The Constitution declares[12] that the President "shall have power, by and with the . . . consent of the Senate, to make treaties". It expressly prohibits a state from making treaties,[13] and provides that "this Constitution, and the laws of the United States made in pursuance thereof, and all treaties made . . . under the authority of the United States, shall be the supreme law of the land."[14]

These phrases tell us simply in whom the power to make treaties resides, to whom it is denied, and that a treaty made under the authority of the United States is on a parity with an act of Congress which is constitutional; and that the Constitution along with them, is the supreme law of the land. No clause in the Con-

[8] U. S. v. Shauver, *supra;* U. S. v. McCullagh, 221 Fed. 288 (1915).
[9] Art. IV, Sec. 3, sub-sec. 2.
[10] Kansas v. Colorado, 206 U. S. 46, 89 (1906).
[11] 258 Fed. 257.
[12] Art. II, Sec. 2, cl. 2.
[13] Art. I, Sec. 10, cl. 1.
[14] Art. VI, cl. 2.

stitution specifies what may be the subject-matter of a treaty. But even those who would grant the widest limits to the treaty-making power do not on that account assert that the President and the Senate have a limitless field of subjects about which to negotiate with foreign countries.[15] On the contrary, all are agreed that the treaty-making power has limits; but none defines those limits clearly, and no two seem agreed on the line of demarcation between what things can be done by treaty and what things cannot.

To the Constitution itself we must go to determine where that limiting line is to be placed. In the second clause of Art. vi we learn that "treaties made under *the authority of the United States*" shall be the supreme law of the land. So we discover that to be a valid document, a treaty must be made "under the authority of the United States." Just what does that qualifying phrase mean? Comparing it with the first clause of Sec. 10, Art. 1, which expressly denies treaty-making power to the state government, it appears that these two clauses were meant to be in antithesis—the one prohibiting the power to the state, the other granting it to the federal government The subjects over which the federal government has authority can be ascertained from the Constitution itself. Now, if a treaty to be valid must be under the authority of the federal government, by the limits placed on the authority of that federal government in the Constitution it can be determined what are the subjects concerning which treaties can be made. In a like manner, also, it is possible to fix upon those things which cannot be made the subject matter of treaties by ascertaining what authority is denied the federal government.

The Tenth Amendment sets forth in no uncertain language that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." How, then, can a treaty which abrogates one of these "reserved powers" be possibly construed to be "under the authority of the United States" as required by Article VI? The Constitution says that the state government and not the federal government, shall have authority over such things—and the Constitution is "the supreme law of the land." One recent writer goes so far as to say that those "powers of the states, having never been given up to the federal government, are no more subject to that government than they are to the government of Great Britain."[16]

[15] The Cherokee Tobacco Case, 78 U. S. 616, 620 (1870); De Geofroy v. Riggs, 133 U. S. 258, 267 (1889); Downes v. Bidwell, 182 U. S. 244, 317, 370 (1901); A. A. Bruce, in 45 U. of P. Law Rev. 693, 698; Wm. Draper Lewis, in 46 U. of P. Law Rev. 73, 80–82; W. R. Vance, in 10 Illinois Law Rev. 679, 681; Elihu Root, in 1 Amer. Jour. of International Law 273, 279; Butler: The Treaty-making Power of the United States, Sec. 2, p. 4; Cooley: Constitutional Law, p. 103.

[16] Henry St. George Tucker: Limitations on the Treaty-Making Power, p. 390.

To carry their argument to a logical conclusion, those who hold that Article VI is in no way modified by the Tenth Amendment must come forth boldly and assert that the federal government, by treaty, can cede a part of the territory of any state, or indeed, all the state, to a foreign country. There are but few who go that far.[17] The weight of opinion is against such an absolute power.[18] And, indeed, when the question did arise over the boundary in Maine between Great Britain and the United States, the federal government did not even pretend to assert the right. On the contrary, the Secretary of State asked Maine and Massachusetts to appoint commissioners, and assured them that no treaty would be submitted to the Senate that did not meet their unanimous approval.[19]

It is a far cry from the vital question of ceding a state's land, to the comparatively insignificant question of regulating the destruction of migratory birds. But they are one in principle; for both are things denied to the federal government by the Tenth Amendment. The most ardent champion of a limitless treaty-power would not assert that the President and two-thirds of the Senate, under the guise of making a treaty, could take from Congress the power of declaring war, or subordinate it in the exercise of that power to the will of any other body, be it state, national, or foreign. Indeed no judge, no statesman, no writer contends that the treaty-making power can alter the form of our government or the general departmental construction of the government, or the constitution of any of the departments; or that it can deprive the federal government or any of its departments of its delegated powers, or transfer such power to another department; or that it can exercise a power confided to another department of the federal government.[20] How, then, is it possible for the treaty making authority to exercise a power prohibited to the federal government or reserved to the States? For all these powers are apportioned by the same Constitution; and in interpreting it, we must read from all four corners, and give to each of its principles equal consideration and value. One writer picturesquely says: "If the treaty-power may not invade the powers of Congress, or the Judiciary, or the President, would not the same prohibition apply to any other branch of the federal government as well as to those? Surely there is no peculiar sanctity that doth hedge Congress,

[17] Lattimore v. Poteet, 39 U. S. 4, 13–14 (1840); A. K. Kuhn, in 7 Columbia Law Rev. 172, 179; Butler: The Treaty-Making Power of the United States, Chap. XVI; Kent's Commentaries, vol. I, p. 167 note b.

[18] Fort Leavenworth R. R. v. Lowe, 114 U. S. 525, 540–1 (1884); Geofroy v. Riggs, 133 U. S. 258, 267 (1889); Downes v. Bidwell, 182 U. S. 244 (1900); A. A. Bruce, in 45 U. of P. Law Rev. 693, 699; Henry St. George Tucker: Limitations on the Treaty-Making Power, Chap. X; Woolsey: Introd. to Study of International Law, Sec. 103, p. 167.

[19] Works of Daniel Webster, vol. V, p. 99; vol. VI, p. 272.

[20] For a complete discussion of these points, see article by Wm. E. Mikell in 57 U. of P. Law Rev. 435 and 528.

the Judiciary, or the President, which should be denied to the states—as integral parts of the federal government. Must the treaty-power timidly pause at the doors of Congress, at the threshhold of the Hall of Justice, or at the doorstep of the White House and confess its impotency to deprive any one of them of one jot or tittle of their constitutional power, and yet with measured tread march ruthlessly over the states which constitute the basic foundation of the government itself?[21]

To maintain the unlimited supremacy of the treaty-making power by deciding that it can abrogate the rights reserved to the states, is to rewrite Article VI so as to read: "The *Federal Government* . . . and all treaties made under the authority of the Federal Government, shall be the supreme law of the land." But the Constitution does not say that. The Constitution, as amended does not embrace federal powers only. It is an instrument which reserves certain powers to the states just as much as it is one which declares the power of the national government. The federal judge protected those state powers against the act of the President and a majority of the Senate and House of Representatives.[22] To be consistent—and incidentally, to follow the Constitution—he should have protected them against the act of the President and two thirds of the Senate.[23]

A. L.

THE CONTINUANCE TO WORK UNDER UNUSUAL ADDITIONAL RISKS AS A BAR TO RECOVERY FOR PERSONAL INJURIES SUSTAINED.—It is clearly settled law in the United States that a party subjected to the negligent act of another where a duty to avoid such negligence exists is bound to exercise reasonable care to avoid injury as a result of such negligence upon recognition of the risk arising therefrom. Many recent cases, however, fail to fully recognize the modern tendencies, which, without changing the rule, have altered its application.

A particular example of this failure to recognize modern interpretations of old rules is the case of Hicks v. The Southern Ry. Co.,[1] where the court held that it was proper to sustain a demurrer to the allegations of the plaintiff that, while employed as a railway postal clerk, he had contracted an illness as a result of exposure in a mail car, which the defendant had failed to heat. In the language of the Court: "The law imposed upon the plaintiff the duty of avoiding the negligence of which he fully knew; and since he did not avoid it, he failed to use ordinary care for his own safety." The sole point, upon which the conclusion of the plaintiff's contri-

[21] Henry St. George Tucker: Limitations on the Treaty-Making Power, p. 412.

[22] U. S. v. Shauver, *supra.*

[23] U. S. v. Thompson, *supra.*

[1] 99 S. E. 218 (Ga. 1919).

butory negligence can be based, is the mere fact of continuing to fulfill his duty to the Government instead of refusing to work under conditions which were probably an additional hazard but which were by no means certain to produce any positive damage. This decision appears improper upon two grounds. First, the determination of negligence, either original or contributory, is a question of fact to be measured by the rule of conduct of a reasonably prudent man, and as such the Court erred in not leaving its determination to the jury. Second, even if the allegations might be deemed demurrable, the court fails to apply the standard of reasonable care in any logical or reasonable manner.

The practice of permitting demurrers or analogous procedures to determine whether a cause of action or defense exists, is based on the theory that the courts should not allow time to be wasted by permitting juries to determine findings where, under the facts admitted, there would be only a single conclusion possible in accordance with the law. These procedures were not created for the purpose of transferring part of the functions of the jury to the court but to have conclusions of law determined with a minimum of delay. Recently they seem to have been permitted to prevent excessive sentimentalism from effectuating injustice and producing verdicts not consistent with the law. Under the present accepted theory of the Jury System, however, the use of such procedures should be most sparing when utilized for the latter object.[2]

The true method of determining negligence, in cases of this character, is to compare the conduct of the allegedly negligent party in each case with the conduct of a reasonably careful man under the circumstances in which the alleged negligent man found himself.[3] This rule should be applied in accordance with the real meaning of its wording, rather than in the somewhat artificial manner that has been the practice of the courts in the past.[4] In the case under consideration, therefore, the true question is: Did the plaintiff act as the reasonably careful man would have acted when confronted with the choice of refusing to continue to fulfill his duty of assisting in maintaining the postal service during time of war or of continuing to labor under circumstances that might or might not result in injury to himself? In Hicks v. The Southern Ry. Co.,[1] this is the sole issue, as the demurrer admits the truth of the allegation that the plaintiff had used all due care to avoid injury and there are no facts to controvert this deduction other than the mere continuance to work. The opinion here like so many opinions in cases of this character fails to recognize any distinction between the two quite separate defences of *contributory negligence*

[2] 4 Harv. Law Rev. 147; Note, 13 L. R. A. 728; Note, 15 L. R. A. 332.

[3] C. C. & C. R. R. v. Terry, 8 Ohio 570 (1858); Railroad Co. v. Gladmon, 82 U. S. 401 (1872); 9 Columbia Law Rev. 154; 62 U. of P. Law Rev. 320; 63 U. of P. Law Rev. 237.

[4] Railroad Co. v. Harmon, 147 U. S. 571 (1892); Darcey v. Lumber Co., 87 Wis. 245, 58 N. W. 382 (1894).

and *assumption of risk* and quite loosely terms the continuing to labor with knowledge of unusual risk as carelessness amounting to contributory negligence. In principle it would seem that if the distinction is sound in the relationship of master and servant there is no valid reason for confusing the two in cases of other relationships. The former denies recovery upon the ground that while the defendant has been guilty of a breech of his duty to the plaintiff, this breach of duty or negligence would not have caused the plaintiff any damage in the absence of the contributory negligence of the plaintiff or at least would not have been responsible for the entire extent of the damage. The defence of assumption of risk, on the contrary, is based upon the ground that the duty of the defendant toward the plaintiff has become limited by the knowledge of the latter that an additional risk exists so that in the eyes of the law there has been no breach of duty upon which to base a right of action. It is highly possible that the courts have felt that this second defence is of such dubious legal validity that they have deliberately refused to extend the doctrine to its logical conclusion and have confined its application to cases of the exact character in which it was first conceived and applied. Whether the doctrine is accepted in relationships other than master and servant is a rather academic question, however, as it is frequently used as a basis for refusing recovery under the guise of the defence of contributory negligence. Even under this disguise, however, the determination to undergo some risk, if it is no greater than that which a reasonably prudent man would deem justifiable to accept and undergo, is not contributory negligence *per se.*[5] Still less is this the case where the party charged with contributory negligence has a right to be in the situation where he was at the time of sustaining damage or has a duty to perform independent of his relationship with the party charged with the original negligence.[6] In one case where a fireman was fulfilling his duty of attempting to extinguish a fire in a railroad yard containing amongst other things a carload of explosives it was held that the jury was justified in not finding him guilty of contributory negligence even though he continued to work under highly perilous conditions knowing that a number of explosions had already occurred.[7] To attain a sound psychological result the courts should weigh in the balance, as does the reasonably careful man, the importance of duty to be fulfilled by the remaining at work in comparison with the degree of danger and risk incurred by so doing. In practice the courts tend to misinterpret the rules they lay down by almost

[5] Mobile & B. Ry. Co. v. Holborn, 84 Ala. 133, 4 So. 146 (1888); Chielinsky v. Hoopes Townsend Co., 1 Marv. 273, 40 Atl. 1127 (Del. 1894); Atlantic R.R. Co. v. Powell, 127 Ga. 805, 56 S. E. 1006 (1907); 2 Harv. Law Rev. 14, 91.

[6] Heaven v. Pender, L. R., 11 Q. B. Div. 503 (1883); Mason v. Yockey, 103 Fed. 265, 43 C. C. A. 228 (1900).

[7] Houston Ry. Co. v. O'Leary, 136 S. W. 601 (Texas 1911); 66 U. of P. Law Rev. 73.

invariably considering that mere knowledge that a risk exsist creates an irrefutable reason for cessation of the labor exposing the injured party to such risk, failure to stop being deemed as sufficing in law to constitute contributory negligence and barring a recovery. As a matter of fact the reasonably prudent man does not consider the taking of some additional risks and chances at times for any number of different reasons as carelessness, but rather on the contrary considers that various other ends for example as the retention of his employment as an important a part of his duty of self-preservation as that of reducing to a minimum the necessary risks of life. Conduct that was more prudent than this would not in fact be that of the reasonably careful man but rather that of the excessively cautious man.

G. B.

BILLS OF PEACE IN TORT CASES.—The doctrine that equity will interfere to prevent a multiplicity of actions rests fundamentally upon the inadequacy of the legal remedy. The prevention of such multiplicity is a persuasive, but not a conclusive argument in favor of the jurisdiction. "The single fact that a multiplicity of suits may be prevented by the assumption of jurisdction by equity is not enough in all cases to sustain it."[1] In cases where one person is forced to sue many, or numerous persons are forced to sue one, equity jurisdiction was originally exercised only where there was a certain privity, common right, or community of interest in the subject matter between the numerous parties, such as disputes between the lord of the manor and his tenants over the customs of the manor,[2] or between a parson and his parishtoners over tithes.[3] Such were the original bills of peace. Under the natural expansion of equity, bills in the nature of bills of peace were granted to prevent a multiplicity of suits in varied classes of cases, in which there was strictly speaking no privity or common right between the numerous parties, and where there was often little more than a community of interest in the law and facts involved. Bills in the nature of bills of peace were allowed to establish a sole fishery right against many claimants;[4] to declare valid or invalid certificates held by some 1,500 claimants for injuries occasioned by the bursting of a dam;[5] to invalidate false stock certificates fraudulently issued;[6] to enjoin a nuisance affecting many property holders;[7] to enjoin a continuing wrongful act injuring the property rights of many;[8] to enjoin suits against numerous insurance

[1] Hale v. Allinson, 188 U. S. 56 (1903).
[2] How v. Tenants of Bromsgrove, 1 Vernon 22 (Eng. 1681).
[3] Brown v. Vermuden, 1 Ch. Ca. 282 (Eng. 1676).
[4] Mayor of York v. Pilkington, 1 Atkyns 282 (Eng. 1737).
[5] Sheffield Water Works v. Yoemans, L. R. 2 Ch. 8 (Eng. 1866).
[6] N. Y., N. H. & H. R. R. Co. v. Schuyler, 17 N. Y. 592 (1858).
[7] Cadigan v. Brown, 120 Mass. 493 (1875).
[8] Ill. Cent. Ry. Co. v. Garrison, 81 Miss. 257, 32 So. 996 (1902); Ballou v. Inhabitants of Hopkinton, 4 Gray 324 (Mass. 1855).

companies when the policies were procured by the same fraud;[9] to enjoin illegal tax proceedings.[10]

The late Professor Pomeroy in his widely accepted work laid down the rule that equity may and should exercise jurisdiction, not only where there is a common right or a community of interest in the subject matter, but also where there is "merely a community of interest in questions of law and fact involved in the controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body."[11] This rule has been quoted and followed in many cases.[12] It has been, however, vigorously attacked, especially in cases of tort actions, and particularly in a well known Mississippi case,[13] which argued that Professor Pomeroy's rule was not justified by an analysis of his authorities, a perusal of which would show that, if there was not a community of interest in the subject matter, each of the numerous parties already had an equitable right and the problem was merely one of joinder of parties in equity; furthermore that bills of peace were never intended to join separate tort actions and that to do so would amount practically to a deprivation of the right to a jury trial. This case has also been widely followed.[14]

The fundamental reason for equity's taking jurisdiction in these cases is the inadequacy of the legal remedy. It must, therefore, be shown that the matter is more easily settled in equity,[15] and that the issues are simplified, not confused, as Professor Pomeroy states in a section inserted in his work after the Tribette decision.[16] It must also be shown that there will be an actual convenience to all parties and that the material interests of none will be overlooked or obstructed.[17] In negligence cases even though the injuries arise out of the same act, if the negligence of the tort-feasor is established, the amount of damages in each case is still a matter which the injured parties have a right to set before a jury. If a court of equity were to refer this matter to a common law jury, the latter would have before it a great mass of facts as to many separate injuries. Under these circumstances the individual issues would be

[9] Virginia-Carolina Chemical Co. v. Home Ins. Co., 113 Fed. 1 (1902).

[10] Cummings v. Merchant's National Bank, 101 U. S. 153 (1879).

[11] Pomeroy's Equity Jurisdiction I, §269.

[12] Carlton v. Newman, 77 Me. 408, 1 Atl. 194 (1885); Breimeyer v. Star Bottling Co., 136 Mo. App. 84, 117 S. W. 119 (1908); Town of Fairfield v. Southport National Bank, 77 Conn. 423, 59 Atl. 513 (1904).

[13] Tribette v. Ill. Central Ry. Co., 70 Miss. 182, 12 So. 32 (1892).

[14] Cumberland Tel. & Tel. v. Williamson, 101 Miss. 1, 57 So. 559 (1912); Madison v. Ducktown, etc., Iron Co., 113 Tenn. 331, 83 S. W. 658 (1904); Turner v. City of Mobile, 135 Ala. 73, 33 So. 132 (1902); Southern Steel Co. v. Hopkins, 157 Ala. 175, 47 So. 274 (1908); reversed, 174 Ala. 465, 57 So. 11 (1911); Hamilton v. Alabama Power Co., 195 Ala. 438, 70 So. 737 (1915); Vandalia Coal Co. v. Lawson, 43 Ind. App. 226, 87 N. E. 47 (1909); Watson v. Huntington, 215 Fed. 472 (1914).

[15] Eureka & K. R. R. Co. v. Cal. & N. Ry. Co., 109 Fed. 509 (1901).

[16] Pomeroy's Equity Jurisdiction I, §251½.

[17] Hale v. Allinson, *supra*.

apt to be confused, and if this were so, a bill in equity would be neither more prompt nor more efficient than a number of suits at law. Furthermore the equity court would not be bound by the finding of a jury whose capacity is merely advisory.[18] The result would be a practical deprivation of the right to a jury trial,[19] an objection which should prevent the exercise of jurisdiction when there is a probability that the equitable remedy would not be more adequate than the several actions at law.[20] If on the other hand the question to be determined is the fact of negligence, the deciding of that question by the court is also a deprivation of the right to a jury trial, unless the evidence is such that a court at law would be justified in directing a verdict upon it.[21] Nevertheless, if no negligence were found, the result would be a great increase in efficiency and a marked simplification of issues.

In a recent case decided in the Federal District Court in Alabama,[22] an injunction was granted to prevent the prosecution of some 130 suits at common law, each alleging the negligent operation of the defendant's dam, whereby the plaintiffs' lands were flooded and injured. Whether or not there was sufficient evidence upon which to direct a verdict was not discussed, the court holding that in their opinion the evidence did not support the allegation of negligence. The court refers with approval to Professor Pomeroy's broad rule,[23] and says that equity may exercise jurisdiction "to determine the extent of the rights of the claimants of distinct interests in a common subject." Stress, however, is laid upon the common defense that there was no negligence, and the decision in Hale v. Allinson,[24] based upon the broad ground of the practical prevention of a multiplicity of suits without prejudice to the material interest of anyone, is quoted with approval. This is the first instance of a court's exercising equitable jurisdiction to enjoin tort actions for negligence, where there is a common defense that there is no negligence, although there have been dicta to that effect,[25] and the principle of common defense has been applied in other types of cases.[26] As the first authority on this point, the case is interesting because it points out an easily tenable middle position between two divergent groups of opinion. Since it is plain that the equitable remedy in this case is more adequate than the 130 suits at law, the fundamental purpose for exercising the jurisdiction is realized. The only objection is that of a possible deprivation of the right to a jury trial, which is of small

[18] Raymond v. Flavel, 27 Ore. 219, 40 Pac. 158 (1895).
[19] Vandalia Coal Co. v. Lawson, p. 249, *supra*.
[20] Johnson v. Swanke, 128 Wis. 68, 107 N. W. 481 (1906).
[21] It is interesting to note that under modern English practice there would be no right to a jury trial in negligence cases. Judicature Act of 1873, order XXXVI; rules 2 to 8; The Annual Practice (1919), p. 587.
[22] Montgomery Light and Water Co. v. Charles et al., 258 Fed. 723 (1919).
[23] Pomeroy's Equity Jurisdiction I, §269.
[24] See note 1. *supra*.
[25] Vandalia Coal Co. v. Lawson, p. 256, *supra*.
[26] Virginia-Carolina Chemical Co. v. Home Ins. Co., *supra*.

weight compared with the very great increase in the judicial efficiency which has been accomplished. Without any reference to community of interests, the decision in this case may be properly based upon the broad equitable ground that a more adequate remedy will in fact be supplied, without a serious prejudice to the material interests of any party.[27]

F. H. B. Jr.

THE SCOPE OF THE FOURTH SECTION OF THE STATUTE OF FRAUDS—The second clause of the fourth section of the original Statute of Frauds[1] has given rise to many and various opinions by the judges who have been called upon to interpret it, both in England and in this country, where it has been substantially followed in the statutes of the various jurisdictions.[2]

It sets forth that "no action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person . . . unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith."

It will be observed that the phraseology is indefinite in three particulars: (1) as to the person to whom the promise is made; (2) as to the estate out of which the promisor is to answer for the debt; and (3) as to the person by whom the promise is made.

In regard to the first and second of these particulars, all authorities are agreed in the interpretation. But the third has ever proven a stumbling block. The difficulty is not evidenced so much by the actual decisions of the cases turning on this point. On the contrary, the great majority of courts seem to have had an intuition as to what was the correct result. But the trouble has always come when the judges have attempted to assign the reasons for their decision.

The opinion in the case of Cincinnati Traction Co., v. Cole,[3] recently decided in the U. S. Circuit Court of Appeals for the Sixth District, is a welcome one in this field. For by its clear language and succinct expression, it should prove a great aid in clearing up the confusion which has been occasioned by the opinions rendered hitherto. It does not confine itself to any one of the three indefinite points afore-mentioned; but gives an illuminating discussion and a satisfying determination of what is the correct interpretation of the statute.

It is evident that the statute refers to a conditional promise only—to pay if the debtor does not. "A promise to be primarily liable, or to be liable at all events, whether any person is or shall

[27] Hale v. Allinson, *supra*.

[1] 29 Car. II, c. 3.

[2] In Pennsylvania, Act of April 26, 1855 (P. L. 308).

[3] 258 Fed. 169 (1919).

become liable or not, is not within the statute."[4] If it were, the statute would include all promises to pay; so conditional promises only are within its contemplation. It does not necessarily follow, however, that all conditional promises to pay the debt of another are within the statute, even though the words of the statute would create that impression.

It says nothing whatever as to the person to whom the promise is made; and, therefore, a promise of the character called for, made to any person, would seem to be within it. But from the earliest case[5] in which such a strict interpretation was contended for, all authorities have agreed that a promise is not within the statute unless it is made to the principal creditor. So a promise to the debtor to pay his debt for good consideration,[6] or to a sheriff who has a writ of execution against the principal debtor,[7] is not within the statute. Lord Denman's limitation is the recognized law today: "The statute applies only to promises made to the person to whom another is answerable."[8]

The phraseology is indefinite as to the estate out of which the promisor is to answer for the debt. But in the preceeding clause of the statute, it is provided that no executor "shall be charged upon a special promise to answer damages *out of his own estate.*" It is fair to assume, therefore, that the meaning of the clause under discussion is that only where the promise is made to answer out of the promisor's own estate, is it within the statute. Accordingly, a promise to answer out of the estate of the debtor,[9] or of the creditor,[10] which may be in the promisor's hands, need not be in writing. Even without the words of the preceding clause as a guide, it would be possible to arrive at this conclusion. For, a promise to pay out of the hands of the promisor is in reality a promise by an agent or a trustee of the debtor; and so practically amounts to a promise by the debtor himself to answer for his own debts. The statute provides that it shall be for the debt "of another person." Therefore, the promisor must be acting, not as a representative of the debtor but in his individual capacity, when he makes the promise; and hence the promise must be to answer out of the promisor's own estate.

As to the person by whom the promise is made, the statute says nothing. To determine this, it is necessary to notice the object which was in view when the statute was enacted. Its ex-

[4] Gibbs v. Blanchard, 15 Mich. 292 (1867); National Bank v. State Bank, 93 Iowa 650, 61 N. W. 1065 (1895); Lakeman v. Mountstephen, L. R. 7 Eng. & Ir. App. 17 (1874); Wald's Pollock on Contracts (3rd ed. by Williston), p. 170.

[5] Eastwood v. Kenyon, 11 Adolph. & E. 438 (1840).

[6] Oliphant v. Patterson, 56 Pa. 368 (1867); Bryant v. Jones, 209 S. W. 30 (Ky. 1919).

[7] Reader v. Kingham, 13 C. B. (N. S.) 344 (1862).

[8] Eastwood v. Kenyon, *supra.*

[9] Throop: Validity of Verbal Agreements, Sec. 13; Pocket v. Almon, 90 Vt. 10, 96 Atl. 421 (1916).

[10] Armstrong v. Bank, 195 S. W. 562 (Mo. 1917).

pressed purpose is "for prevention of many fraudulent practices which are so commonly endeavored to be upheld by perjury and subornation of perjury."[11] The thought in the minds of those who framed the statute, then, was to safeguard the defendant from being charged with another's obligation solely on the testimony of witnesses. If this protection is afforded by some other sufficient means, does the statute apply? If there is another element which renders the making of the promise more likely, if the making of the promise is not dependent solely on the testimony of witnesses, must the promise be in writing and signed by the promisor? Obviously, if the conditions named be present, the statute is not required and need not be applied. And such has been the current of opinion. The courts, however, have not been clearly conscious on what grounds the decisions can be justified. In one line of cases, the ground expressed is that "whenever the *main purpose and object* of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or a damage to the other contracting party, his promise is not within the statute."[12]

Other cases hold that if a new consideration or benefit has moved to the promisor, it is sufficient to take it out of the statute. Chancellor Kent declared this as a general rule in an early case;[13] but later decisions[14] have held that if such consideration consisted merely of harm to the creditor and was not beneficial to the promisor, the promise is still within the statute. Still another opinion[16] is that if the promisor is to be held liable at all, it should not be on the promise, but in quasi contract for the benefit received.[17]

Judge Cochran in Cincinnatti Traction Co., v. Cole, after a discussion of these involved and confusing views, avoids them, and adopts a position which requires no qualification, and which is strong enough in its simplicity to meet the test of every case. He declares his position to be that "it is the thought of the statute that only a promise by a person who has no personal concern in the creation or payment of the debt to which it relates is within it." This does not read any exception into the statute any more than do the decisions which require that the promise shall be to

[11] 29 Car. II, c. 3, sec. 1.

[12] Emerson v. Slater, 63 U. S. 28 (1859); Nugent v. Wolfe, 111 Pa. 471, 4 Atl. 15 (1886); Kirby v. Kirby, 248 Pa. 117, 93 Atl. 874 (1915); 62 U. of P. Law Rev. 314; 63 U. of P. Law Rev. 230, 339.

[13] Leonard v. Vredenburgh, 8 Johns. 29 (N. Y. 1811).

[14] Riegelman v. Focht, 141 Pa. 380, 21 Atl. 601 (1891); Ames v. Foster, 106 Mass. 400 (1871); Ackley v. Parmenter, 98 N. Y. 425 (1885); 8 Columbia Law Rev. 236.

[15] Richardson v. Albright, 224 N. Y. 497, 121 N. E. 362 (1918) holds that both beneficial interest to promisor and new consideration are necessary to take promise outside the statute.

[16] 23 Harv. Law Rev. 136.

[17] 33 U. of P. Law Rev. 21 for a general discussion of these various grounds for decision.

the creditor only, and that the promise must be to answer out of the creditor's own estate. Like them it is but a limitation on the scope of a statute which is unlimited in its phraseology, but which is very definite in its underlying purpose.

So, to bring a promise within the statute, it is not sufficient that it is a promise to pay the debt of another. "Though it may be a conditional promise, if it is not to the creditor, or not by one who has no personal concern in the debt, or is not to pay it out of the promisor's own estate, it is just as much not within the statute as it would have been, had it been, not a conditional, but an absolute promise."[18]

A. L.

THE PENNSYLVANIA "STOP, LOOK AND LISTEN" RULE—To hold a man guilty of contributory negligence by reason of neglecting an act, the omission of which in no way contributed to his injury, would seem a decision apparently absurd on its face. And yet, by applying the "stop, look, and listen" rule as it has come to be understood by the courts of Pennsylvania, to the facts of a comparatively recent case[1] the Supreme Court of that state has arrived at just such a conclusion.

From the undisputed facts of this case, it appears that one Benner was driving a one-horse buggy along the public highway which led across the tracks of the defendant's right-of-way. These tracks ran approximately north and south, and consisted of four main tracks and two sidings, one of which stopped at the edge of the public road. Benner, approaching from the east had, therefore, only five tracks to cross. At the time of this accident, the crossing was not equipped with any safety gates, automatic bells, flagmen, or other safety devices. Freight cars obviously not in the process of being moved were occupying both sidings, and these cars, together with various buildings and trees, made it impossible for anyone approaching from the east to see either up or down the four main tracks until he had crossed over the second siding. Benner passed by the first siding and drove on to the second siding, reining in his horse before reaching the first main track. At this point, the first from which he could get any view of the main tracks at all, he stopped, looked and listened, and neither seeing nor hearing anything, drove on. The buggy was struck on the fourth main track by an express train travelling at the rate of fifty-nine miles an hour, and Benner was thrown out and killed. The engineer of the train had passed the whistle-board, some twelve hundred feet from the crossing, without giving the required warning, and failed to give any signal until the train was only one hundred and fifty feet from the deceased. The case was submitted

[18] This section of the Statute of Frauds is the subject of a series of articles by John Delatre Falconbridge, which is being presented in the current volume of the University of Pennsylvania Law Review. (See 68 U. of P. Law Rev. 1 and *infra* p. 137).

[1] Benner v. P. & R. R. R. Co., 262 Pa. 307 (1918).

to the jury by the lower court and verdict and judgment were given for the plaintiff, Benner's wife. On the defendant's assignments of error, the Supreme Court reversed the decision, and directed a judgment *non obstante veredicto* for the defendant, holding that Benner was guilty of contributory negligence in law, and that the case was wrongfully submitted to the jury.

Among other things, the court in this case pointed out, that, by reason of a long line of decisions, the "stop, look, and listen" rule in Pennsylvania has become so "inflexible"[2] that if the injured person failed to stop, etc., before crossing any of the tracks of the defendant's right-of-way a nonsuit should be ordered regardless of all other circumstances in the case. Two members of the court dissented, Simpson and Stewart, J. J. In his very able opinion, Mr. Justice Simpson bases his dissent on three main objections.

Of these objections, in the order of their apparent strength, the first would seem to argue that the case was one for the jury, because of the well-established rule in "stop, look, and listen" cases that there is a presumption of proper conduct on the part of the injured party, which is rebuttable only by evidence of the defendant railroad to the contrary.[3] In answer to this objection, it may be said that the defendant, by his witnesses, produced uncontroverted evidence that Benner did not do that which the majority of the court held, as a matter of law, he must have done in order to relieve himself of contributory negligence—namely, stop before crossing the siding.

A second objection, founded on reason and analogy, is apparently far more difficult to answer, unless the case of Peoples v. P. R. R.,[4] cited by the majority court, is authority to the contrary. Mr. Justice Simpson argues that the distinction between the duty of persons to stop before crossing railroad tracks on which trains must move at high speed, and their duty to merely look and listen before crossing trolley tracks, because the cars run at a less rate of speed, should be applied as between the sidings and main tracks of a railroad crossing. The comparability of a siding to a trolley track in respect to the quantum of danger involved in crossing it, is entirely logical as to the facts of the main case. It is conceivable, however, that the analogy might be more doubtful under a different set of facts.

There is a third objection made by the dissenting justice, which is conclusive. In the words of Judge Simpson, "To say then that plaintiff cannot recover because it is alleged that her husband did not do a useless thing, which no one else ever does, is to punish her, though both she and her husband were innocent, and benefit no one but the defendant, which, the jury has found,

[2] Ihrig v. Erie R. R. Co., 210 Pa. 98 (1904).

[3] Longnecker v. P. R. R. Co., 105 Pa. 328 (1884); Hanna v. P. & R. R. R. Co., 213 Pa. 157 (1906).

[4] 251 Pa. 275 (1916).

did her a most grievous wrong." According to the court's opinion, the negligence of the deceased consisted in failing to stop before crossing the siding, over which he passed in perfect safety. On the other hand, his injury occurred on one of the main tracks, and before attempting to cross any of these, Benner did everything required by law or reason to relieve him of negligence. Such a conclusion would seem to be in violation of one of the most elementary principles of legal responsibility, for the so-called negligence of the deceased lacks the necessary element of being negligence *dans locum injuriae.*[5] An analogous result would be reached, if a court were to hold an automobile owner negligent for running down a pedestrian who had jumped from the sidewalk directly in the path of the automobile, provided it were proved that at the time of the accident the car was likely to explode owing to the negligence of the owner in not having it inspected.

A gradual tightening of the "stop, look, and listen" rule in Pennsylvania is apparent from an examination of other comparatively recent decisions. In the case of Potter v. P. R. R.[6] it was held to be contributory negligence in law for the driver of a horse and wagon to stop so near the defendant's tracks that his animal, frightened by the approach of a train, jumped forward, drawing its owner in the path of the locomotive. The same year the court made a similar decision in the case of a person who had stopped twenty feet from a siding and forty feet from the main track, holding that the distance was too great.[7] And yet in a very much earlier case, the court ruled, that if the question of what was the proper place to stop was disputed it was a matter for the jury to decide.[8] It would seem that this earlier decision would have justified the court in the two more recent cases cited in relaxing the growing severity of the "rule." Again, in Neiman v. D. & H. Canal Co.,[9] the court submitted the case to the jury where the evidence showed that the vision of the injured party was obscured by escaping steam; and in a later case the plaintiff was nonsuited for stopping at a point where his view was obstructed.[10] Another very recent decision[11] has refused to consider an implied invitation on the part of the defendant railroad to the injured party to cross, by reason of the fact that its safety gates were open at a time when they should have been closed.

Although Mr. Justice Simpson does not believe that the facts of the main case bring it within the "rule," the following comment upon the "rule" itself, quoted from his dissent, is indeed significant.

[5] Metropolitan Street Ry. Co. v. Jackson, 3 App. Cases 193, 47 L. J. C. P. 303 (1877); Baughman v. Shenango & Allegheny R. R. Co., 92 Pa. 335 (1880).
[6] 221 Pa. 550 (1908).
[7] Walsh v. P. R. R. Co., 222 Pa. 162 (1908).
[8] Whitman v. P. R. R. Co., 156 Pa. 175 (1893).
[9] 149 Pa. 92 (1892).
[10] Mankewicz v. Lehigh Valley R. R., 214 Pa. 386 (1906).
[11] Kipp v. Central R. R. Co. of N. J., 265 Pa. 20 (1919).

"Since that rule was first adopted and published," says the Justice, "the members of thirty-one legislatures and one constitutional convention have been elected, met and adjourned, leaving it still in force, and because thereof, despite doubts as to the wisdom of making it arbitrary, *stare decisis* compels our adherence to it now, however much plaintiff may suffer by reason thereof." At another place in his dissent Judge Simpson points out the fallacy of expecting the people to obey a rule which uselessly attempts to delay them in the ends they seek to accomplish. If these comments voice the sentiment of the judiciary of this state, then some legislative enactment would seem imperative to cure this growing injustice.

Assuming that the promulgators of the "rule" had a double reason in view, namely, the exaction of a higher degree of care from the public, and the economic necessity of the time, visualized or felt as public policy, since the railroads were recognized as public necessities, their first object has not been attained. The ever-increasing number of accidents at grade crossings bears witness to this. Nor does public policy require that the railroads should continue to be protected in this manner.

C. W. B. T.

PHYSICAL INJURY DUE TO SPOKEN WORDS.—The courts in the administration of justice must deal with all sorts and conditions of men. Mankind is made up of individuals and most cases at law present two or more individuals in some particular relationship. But the law is concerned with mankind as a whole, with the ordinary man, and its principles and rules are established for ordinary men of average mental and physical equipment.[1] Therefore the law refuses to listen to complaints based on injuries which were suffered only because of the supersensitive temperament or the abnormal physical condition of the person harmed.[2] In such cases it is said that the result is not to be reasonably anticipated, is unexpected and unusual; the chain of causation is beyond the control of the person at fault and the damage is too indirect and remote to create liability.

This insistence upon the average man as the norm or standard is especially important in a class of cases where the personal equation is necessarily involved, those cases in which the action is based on liability for fright, or a nervous or mental shock or mental anguish. Whether there is any liability in such cases depends first of all on the question whether an ordinary man would have sustained any injury from the alleged cause.[3] "The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself."[4]

[1] Bouvier, Law Dictionary; see "Negligence," "Skill," etc.

[2] Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335 (1899); Braun v. Craven, 175 Ill. 401, 51 N. E. 657 (1898).

[3] Nelson v. Crawford, *supra;* Braun v. Craven, *supra.*

[4] Kennedy, J., in Dulieu v. White, (1901) 2 K. B. 669, at page 675.

The expressions "fright," "mental anguish," and like terms are used with no apparent discrimination when the immediate effect of the wilful misconduct or negligence of the defendant is a shock to the nervous system of the plaintiff, without any direct physical impact or assault upon the body of the plaintiff.[5]

Fright and nervous shock, if no other injury is sustained, are not enough in themselves to form the basis of an action for damages.[6] This is because a claim based on fright or nervous shock, without any resulting or attendant physical injury is hard to disprove and the courts look with suspicion on such cases. It is almost impossible to establish fraud under such circumstances, however strongly suspected. All the evidence is in the mind of the plaintiff, and, if such cases were actionable, the court would be forced to rely solely on his veracity.

When physical injury follows as a natural consequence of fright, nervous shock or mental anguish, the plaintiff has a much better claim to present. He has evidence to offer as to how seriously he was harmed by the defendant's tort. But here the cases make a distinction between negligent acts and wilful acts as a cause of the physical injury to the plaintiff. Whether an act of negligence on the part of the defendant, resulting in a nervous shock to the plaintiff which is attended by physical injury, is actionable has been a much disputed question. "A recovery has been allowed by the Court of King's Bench in England, . . . the Supreme Courts of Texas, Minnesota and South Carolina. A recovery has been denied by the Privy Council, England, and the Supreme Courts of New York, Pennsylvania and Massachusetts."[7] The conflict of opinions seems to be due to the fact that the courts approach the problem with different conceptions of legal injury and proximate cause.

But when the fright and the resulting physical injury are occasioned by a deliberate and wilful tort, it is well settled that an action will lie.[8] Any act done with the malicious purpose of frightening the plaintiff and which could be reasonably calculated to cause physical injury because of a shock resulting therefrom, would be a sufficient foundation for such a case. It has been held that spoken words, if maliciously made and if they could be reasonably expected to frighten a person, are actionable if they did cause physical harm.[9]

Interest in this whole problem is revived by the decision in Janvier v. Sweeney and Barker,[10] where the court held that the

[5] 5 Columbia Law Rev. 179.

[6] Burdick's Torts, 3rd Ed., Sec. 11, p. 113; 14 L. R. A. 666 and cases therein cited; Railroad Company vs. Dalton, 65 Kan. 661, 70 Pac. 645 (1902).

[7] Francis H. Bohlen in 50 Am. Law Reg. 141 and cases therein cited; 22 L. R. A., N. S., 1073.

[8] Preiser v. Wielandt, 48 App. Div. N. Y. 569, 62 N. Y. S. 890 (1900); Watson v. Dilts, 116 Iowa 249, 89 N. W. 1068 (1902).

[9] Wilkinson v. Downton, 76 L. T. R. 493 (Eng. 1897).

[10] 121 L. T. R. 179 (Eng. 1919).

plaintiff could recover for physical injury caused by threats and spoken words. There was no evidence that the plaintiff was in obvious ill-health or of extreme nervous temperament. The case shows how far the court can go in establishing liability under such circumstances and yet stay well within the precedents. The defendant Barker told the plaintiff that he represented the military authorities and that she was wanted because she had been corresponding with a German spy. The jury found that the statements were calculated to cause physical injury to the plaintiff and were maliciously made, with the knowledge that they were likely to cause such damage.

The decision is in accord with the rule that when a person has been frightened wilfully and intentionally and he suffers a physical injury which could be inferred as likely to result therefrom, he can recover. Moreover the English court had authority almost exactly in point with the principal case: the case of Wilkinson v. Downton,[11] in which the defendant intended to subject the plaintiff to fright which, in the opinion of the jury, was so severe that an ordinary man would realize that it might and would occasion serious physical consequences to the plaintiff. The court, in the case under discussion, followed the previous decision and quoted it. The only distinction between the two cases being that, in the principal case, while the defendant's conduct was a wrong in itself in that the threats were made to the plaintiff to induce her to steal from her employer letters which the defendant wanted to obtain, his conduct was not a wrong towards the plaintiff apart from the tendency to cause fright, while in the Wilkinson case the defendant had, as a joke, practiced fraud on the plaintiff by telling her that her husband had been seriously injured in a railway accident. The case under discussion therefore goes further than the previous decision, in that here there was no wrong done to the plaintiff apart from the tendency of the defendant's words to cause her physical injury through fright which he wilfully intended to create in her.

There is no logical reason why the connection between certain statements made to a person and the illness of that person should be considered too remote for the law to be concerned with. "Remoteness as a legal ground for the exclusion of damage in an action of tort means, not severance in point of time, but the absence of direct and natural causal sequence—the inability to trace in regard to the damage *propter hoc* in a necessary or natural descent from the wrongful act."[12] In the case of Dulieu v. White,[13] Kennedy, J. cites an unreported case, Smith v. Johnson & Co., referred to in Wilkinson v. Downton, in which a bystander suffered serious physical illness from horror due to witnessing an accident

[11] *Supra.*
[12] Kennedy, J., in Dulieu v. White, *supra*, at p. 678.
[13] *Supra*, at p. 675.

caused by the defendant; he distinguishes this case from Dulieu v. White on the ground that the defendant was guilty of no wrong to the plaintiff, since there was no reason to anticipate at the time he was guilty of the negligence which caused the accident, that the accident would be of such a terrible nature that a mere bystander would be so shocked at seeing the accident as to suffer physical injury. Whereas in Dulieu v. White the conduct of the defendant threatened direct physical injury to the plaintiff and so was wrongful to him, apart from the mere possibility that he would be so seriously frightened as to be physically injured.

Spoken words can easily start a train of events which ends in physical injury and it is often easy, in cases like the one under discussion, to trace the physical injury by natural steps back to the words used. When one considers that England was at war at the time, it is not strange that the woman was greatly frightened; an ordinary person would be certain to suffer a shock from such an accusation, and that illness resulted is not at all surprising. Add to these factors the elements of malicious purpose and knowledge that such accusations were likely to cause physical injury, facts found by the jury, and the conclusion is evident: if the physical illness was the direct result of the nervous shock caused by the statements made to her by the defendant, the plaintiff had a right to recover. "The true question would seem to be whether the fear in which the plaintiff was put by the defendant's wrongful or negligent conduct was such as, in the circumstances, would naturally be suffered by a person of ordinary courage and temper, and such as might thereupon naturally and probably lead in the plaintiff's case to the physical effects complained of."[14] All of these things were found in the case under discussion.

Cases, in which physical injury resulting from spoken words is made the cause of an action, are rare. When the words are not spoken directly to the plaintiff, an action based on illness or shock resulting therefrom may be denied without conflict with the principal case, on the ground that there is no misconduct towards the person injured.[15] But when the words are spoken to the plaintiff wilfully and with an intention of causing fright, then there is no reason why the usual rules for tort liability should not be applied, and if a case is made out, the fact that spoken words were the origin of the injury should not affect the result. The rules are broad enough to include such a case and, in England at least, there is authority for such a decision.

E. L. P.

THE BURDEN OF PROOF WHERE THERE HAS BEEN LOSS BY BAILEE.—Agistment, both at common law and by statute, is universally treated and considered as one species of bailment, and

[14] Pollock, Torts, 9th Ed., 53.

[15] Bucknam v. Great Northern Ry., 76 Minn. 373, 79 N. W. 98 (1899); Gaskins v. Runkle, 25 Ind. App. 584, 58 N. E. 740 (1900).

the liabilities of agisters do not in the main differ from those of other bailees for hire.[1] In the absence of a special contract an agister is not an insurer of the safety of the animals intrusted to him. He takes them on an implied contract that he will look after them with ordinary diligence and reasonable care, and therefore he is only bound to exercise that degree of care which a man of ordinary prudence would use under the same circumstances towards his own property.[2] One of the essential parts of every contract of bailment is the obligation to redeliver the property on demand at the termination of the bailment, and if the bailee fails to do so, he is liable unless he can show that his inability arises without fault on his part. The difficult question to determine, as in many other forms of bailment, is which party has the burden of proof. Where there is a special contract by which the agister undertakes to return the property, which amounts to a guaranty, he has the burden of accounting for the same.[3] But with this exception, there is undoubtedly an elementary rule of law, that in all actions founded upon negligence, or a culpable breach of duty, the burden is on the plaintiff to establish negligence. There is, however, a decided conflict as to whether the loss, while in the bailee's possession, raises such a presumption of negligence on his part as to establish a prima facie case against him.

There is one line of decisions which holds the burden of proving negligence rests on the plaintiff throughout, and that when an agister is sued for a negligent loss, the mere proof of the loss does not make out a prima facie case, the plaintiff being required to show that it was the result of a failure on the part of the defendant to exercise the reasonable care and diligence imposed on him by the nature of his undertaking.[4] On the other hand, the better and more modern rule modifies the preceding one in that the plaintiff establishes a prima facie case by showing that the property delivered to the agister was not delivered back to him on demand.[5] This is on the theory that the bailee's failure to redeliver raises the presumption that the loss was due to his own negligence. The most troublesome question occurs at just this stage of the proceedings. Must the bailee overcome this prima facie presumption by showing that the loss or damage was consistent with the ab-

[1] Cotton v. Arnold, 11 Mo. App. 596, 95 S. W. 280 (1906); Wilensky v. Martin, 60 S. E. 1074 (Ga. 1908).

[2] Smith v. Cook, 1 Q. B. D. 79 (Eng. 1875); Sargent v. Slack, 47 Vt. 674 (1875); Cloyd v. Steiger, 139 Ill. 41, 28 N. E. 987 (1891); O'Keefe v. Talbot, 84 Iowa 233, 50 N. W. 978 (1892); Arrington Bros. v. Fleming, 117 Ga. 449, 43 S. E. 691 (1903); Vaughn v. Bixby, 24 Cal. App. 641, 142 Pac. 100 (1914).

[3] Ware Cattle Co. v. Anderson Co., 107 Iowa 231, 77 N. W. 1026 (1899).

[4] Broadwater v. Blot, 3 E. C. L. 216 (Eng. 1817); McCarthy v. Wolfe, 40 Mo. 520 (1867); Kemp v. Phillips, 55 Vt. 69 (1883); Wood v. Remick, 143 Mass. 453, 9 N. E. 831 (1887).

[5] Cummings v. Mastin, 43 Mo. App. 558 (1891); Pearce v. Sheppard, 24 Ont. 167 (1893); Shropshire v. Sidebottom, 30 Mont. 406, 76 Pac. 941 (1904); Mattern v. McCarthy, 73 Neb. 228, 102 N. W. 468 (1905).

sence of fault on his part, or in other words, that he had exercised such care as was required by the nature of the bailment? Or does he shift back to the plaintiff the burden of proceeding further, by simply stating how the loss occurred, leaving it to the plaintiff to prove the negligence? The recent English case of *Coldman v. Hill*[6] not only seems to support the first proposition, but to extend its application. The facts involved were that a farmer accepted certain cattle for agistment, which later were stolen without any default or negligence on his part. However, after learning of the theft, he neither notified the owner, nor did he make any attempt to recover them by search or notification to the police. The Court of Kings Bench reversed the decision of the lower court, which had held that the burden of proof was upon the plaintiff, to show that the defendant's omission to act subsequent to the disappearance of the cattle was negligence which caused the loss of the cattle. There was evidence that even had the defendant taken these steps, the cows would not have been recovered. The case thus stands for the following propositions: (a) that when there is a loss of agisted cattle, the onus is on the agister to prove that it was not due to his negligence. And although he may clearly show that the cattle got out of custody and control without any fault on his part, yet when there is only a temporary loss and he has taken no steps towards recovery, he must (b) also show that had he taken such steps he would not have recovered the cattle and prevented the final loss.

The American cases, broadly speaking, are not in accord with the above case, nor would the principles therein laid down admit of such an interpretation. In the case of *Casey v. Donovan*,[7] the Court held, that although the bailor made out a prima facie case, by showing that the property delivered to the bailee was not returned to him on demand, and that this prima facie presumption of negligence satisfied the burden of proof which rested with the bailor, nevertheless the burden of proof of the bailee's negligence always remained with the bailor. And in *Calland v. Nichols*,[8] where a number of cattle died while in the bailee's charge, the mere statement of that fact was held as a sufficient accounting on the bailee's part, and the burden of proof of negligence was upon the bailor. In many other cases the law is laid down, that an agister is only bound to exercise care in preserving and protecting the property while in his custody, and he may relieve himself from liability in case of a loss by showing that the property was not lost by reason of his negligence.[9] In no case has the difference

[6] 1 K. B. 443 (Eng. 1919).

[7] 65 Mo. App. 521 (1896).

[8] 30 Neb. 532, 46 S. W. 631 (1890).

[9] Union Stock Yard Co. v. Mallory Co., 157 Ill. 554, 41 N. E. 888 (1895); Rayl v. Kreilich, 74 Mo. App. 246 (1898); Parlato v. Thomas, 123 N. Y. S. 373 (1910); Grout v. Meyer, 91 Neb. 845, 137 N. W. 844 (1912).

been drawn between a temporary and a complete loss, so as to shift the burden of proof in one case and not in the other. It seems that although the burden of proceeding with the evidence may shift, yet if the liability of an agister is founded upon negligence, as treated by the American cases, the burden of proving negligence should be upon the plaintiff, and remain upon him throughout the trial. And it certainly is the universal rule, that when the plaintiff alleges specific negligence in caring for his animals, he must prove the allegation.[10] A few jurisdictions require that the bailee show that he has exercised such care as is reasonably required by the nature of the bailment. In such states the plaintiff need not allege negligence on the bailee's part, its absence being a matter of defense, and to exonerate himself the defendant must show due care. The reason being, that when property is not returned by the bailee, it would be a very difficult thing for the bailor to show in what way the loss occurred, or that it had actually occurred by the negligence of the bailee, or his employees. The bailor not being so likely to know what caused the injury or loss as would the bailee in whose possession the bailed property was.[11] However, there is undoubted authority[12] that an agister must notify the bailor of any unusual risk to which his cattle are exposed, or of any change in conditions by which his property might be harmed. On this ground there may be some reason for the court's decision in the principal case.

J. H. C.

[10] Crawford v. Cashman, 82 Mo. App. 554 (1900); Shropshire v. Sidebottom, *supra.*

[11] Hudson v. Bradford, 91 Ill. App. 218 (1900); Bagley v. Black, 154 S. W. 247 (Tex. 1913); Nutt v. Davison, 54 Col. 586, 131 Pac. 390 (1913).

[12] McLain v. Lloyd, 5 Phila. 195 (1863); Kemp v. Phillips, *supra;* Nutt v. Davison, *supra.*